

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DARIUS DESHAWN CARTER,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 270680

Wayne Circuit Court

LC No. 05-012212-01

Before: Fitzgerald, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to do great bodily harm less than murder, MCL 750.84 (as a lesser offense to assault with intent to commit murder, MCL 750.83), felonious assault, MCL 750.82, felon in possession of a firearm, MCL 750.224f, discharging a firearm at a dwelling or occupied structure, MCL 750.234b, and possession of a firearm during the commission of a felony, MCL 750.227b. He was acquitted of three additional charges of assault with intent to commit murder. He was sentenced to concurrent prison terms of 24 to 120 months for the assault with intent to do great bodily harm conviction, 24 to 48 months for the felonious assault and discharging a firearm convictions, and 24 to 60 months for the felon in possession conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We vacate the felonious assault conviction, but affirm in all other respects. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that the evidence was insufficient to identify him as the perpetrator of the crimes charged. Identity is an essential element of a criminal prosecution, *People v Oliphant*, 399 Mich 472, 489; 250 NW2d 443 (1976), and the prosecution must identify the accused as the person who committed the offense. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). However, “[t]he prosecutor is not required to present direct evidence linking the defendant to the crime.” *People v Saunders*, 189 Mich App 494, 495; 473 NW2d 755 (1991). The defendant’s identity may be proved by circumstantial evidence alone. *People v Garcia*, 33 Mich App 598, 600; 190 NW2d 347 (1971); *Kern, supra*.

There was evidence that defendant made a veiled threat to Johnny Hardison that something would happen after dark. During the early morning hours, defendant drove past Hardison’s house and told Hardison to get ready. He then drove around the block. Shortly thereafter, a gunman appeared in the bushes across the street and started firing shots at Hardison

and his house. There was evidence that the gunman was at least 200 feet away, that most of his body was concealed by the bushes, that he was wearing a hood on, and that the street lights were off. However, Hardison testified that it was defendant who walked from behind the building into the bushes and started shooting. Hardison's positive identification of defendant and other circumstantial evidence, viewed most favorably to the prosecution, was sufficient to identify defendant as the perpetrator. *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000); *People v Newby*, 66 Mich App 400, 405; 239 NW2d 387 (1976). The credibility of the identification testimony was for the trier of fact to resolve and this Court will not resolve it anew. *Davis, supra*.

Defendant next argues that his dual convictions for assault with intent to do great bodily harm and felonious assault for a single assault on Hardison are barred by double jeopardy. Although this issue was not preserved for appeal, *People v Geno*, 261 Mich App 624, 626; 683 NW2d 687 (2004), the prosecutor concedes error. The proper remedy for a multiple punishment double jeopardy violation is to affirm the conviction and sentence for the greater offense and to vacate the conviction and sentence for the lesser offense. *People v Herron*, 464 Mich 593, 609-610; 628 NW2d 528 (2001). Accordingly, we vacate defendant's felonious assault conviction, but affirm in all other respects.

Affirmed in part and vacated in part.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O'Connell